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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 77-28

IOWA BEEF PROCESSORS, INC.,
Petitioner,

vs.

VALLEY VIEW CATTLE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Iowa Beef Processors, Inc. ("IBP") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 18, 1977.

OPINION BELOW.

The opinion of the Court of Appeals is reported at 548 F. 2d 1219 (5th Cir. 1977), and appears in Appendix A at pages A1-A9.

JURISDICTION.

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 18, 1977, and the petition for rehearing

denied on April 15, 1977. (A copy of the notification of this order appears as Appendix B.) The jurisdiction of this Court is invoked under 28 U. S. C. § 1254.

QUESTIONS PRESENTED.

Whether the Fifth Circuit's decision—that a meat packer which paid promptly for cattle purchased from a cattle dealer nevertheless remained directly liable to the dealer's unpaid supplier when the dealer went bankrupt—

1. Frustrates the underlying prompt payment policy of the Packers & Stockyards Act, as interpreted by this Court in *Mahon* v. *Stowers*, 416 U. S. 100 (1974);

2. Misapplies the Restatement of Agency, in conflict with well-established principles of Texas agency law, in a way that will adversely affect modern commercial transactions in the cattle industry;

3. Conflicts with the Eighth Circuit's interpretation and application of basic agency principles in *Farm Bureau Co-Operative Mill & Supply, Inc.* v. *Blue Star Foods, Inc.*, 238 F. 2d 326 (8th Cir. 1956).

STATEMENT OF THE CASE.

This case involves the question as to who should bear the loss from a cattle dealer's insolvency and consequent failure to pay Valley View Cattle Company ("Valley View") for cattle he bought and resold to IBP—an issue having broad implications for commercial practices in the cattle industry. The relevant facts are simple and undisputed. As summarized by the Fifth Circuit:

For about eight years, IBP and Louie Heller, a cattle buyer, had "a business arrangement or fixed course of dealings" (A5) under which IBP regularly offered to buy from Heller specified numbers of specified types of cattle at varying quoted prices,

per hundredweight, based upon the dressed weight of the carcass, *i.e.*, after slaughter. Heller would accept IBP's offer by purchasing cattle at Texas feedlots for live weight prices of his own choosing and shipping them to IBP's Emporia, Kansas, slaughtering plant in railcars which he had leased. Heller also sold cattle to packers other than IBP, and did not tell the feedlot where he was going to send the cattle at the time of purchase.

Upon request, after the cattle were received in Kansas, IBP would wire-transfer to Heller's Illinois bank account a substantial portion of the estimated dressed weight purchase price and would mail a check for the balance after slaughter, a day or so later, when the actual dressed weight was determined, as required by their course of dealing and the Packers & Stockyards Act's prompt payment regulation.

Heller took the risk of profit (or loss), depending on the difference between his live weight cost and the dressed weight resale price, less his freight and overhead. Heller always took title to cattle in his own name and paid his suppliers with his own checks.* (A4-A5.)

The transaction at issue followed the usual pattern. On January 9, 1974, Heller bought 259 head of cattle from Valley View at a feed lot in Texas for $143,276.74, commingled them with 221 head purchased from another feeder and shipped them to Kansas. Valley View dealt with Heller in this transaction as an independent dealer, as it had in the past, and Heller did not identify to whom he would resell and ship the cattle. When the cattle arrived at Emporia on January 30, 1974, IBP wired $240,000 to Heller as partial payment and, after slaughter on January 31, IBP mailed Heller a check for the $25,904.40 balance of the agreed-upon dressed weight purchase price for the 480 head—a total of $75.90 less than Heller's cost for the cattle (without considering his freight and overhead). Subsequently, Heller delivered checks to Valley View for the agreed-

* Unknown to IBP, Heller did not customarily mail his checks until after he received payment from IBP.

upon live weight purchase price, but these were dishonored when Heller went into bankruptcy on February 12, 1974. (A1-A2.) Valley View later recovered a total of $29,627.33 from claims against Heller's bankrupt estate and his Packers & Stockyards Act dealer's bond and sued IBP to recover the balance of Heller's purchase price ($113,649.41).

Prior to trial, IBP moved for summary judgment, which the trial court denied without opinion. Following an adverse jury verdict, IBP moved for (i) judgment n.o.v. because there was no competent or substantial evidence to support a finding that IBP should bear the loss resulting from Heller's insolvency, and (ii) a new trial due to errors in the instructions and admission of evidence. Both motions were denied.

On appeal, the Fifth Circuit affirmed on the ground that Heller was IBP's agent in the transaction, relying upon the fact that IBP immediately paid Heller for the cattle it received, but Heller deferred his own payments to cattle sellers (a course of dealing that the Fifth Circuit erroneously viewed as contrary to the Packers & Stockyards Act). (A9.)

REASONS FOR GRANTING THE WRIT.

A. The Decision Below Frustrates the Policies of the Packers & Stockyards Act Regarding Cattle Transactions.

Regulations under the Packers & Stockyards Act, 7 U. S. C. §§ 181 *et seq.* (1958), are designed to control deceptive and monopolistic practices of packers and to prevent restraints of trade in the purchase and sale of cattle. But in *Mahon* v. *Stowers*, 416 U. S. 100, 108 (1974), reversing a Fifth Circuit decision, this Court stressed that the Packers & Stockyards Act was not intended "to guarantee persons who sell cattle to such packers a special favored position in regard to the packers' assets." *Mahon* v. *Stowers* held that the cattle seller who extended credit in a sale to the packer assumed "the normal risks of insolvency" (416 U. S. at 112) and, not having been paid

by the packer, could assert no preferential claim to assets of the packer held by the trustee in bankruptcy.

The cattle seller in this case, Valley View, is another step removed from IBP, whom the Fifth Circuit held liable. Valley View extended credit to Heller, the dealer to whom it sold its cattle, and did not receive payment because of Heller's intervening bankruptcy. Under the principle expressed in *Mahon* v. *Stowers*, Valley View, not IBP, must bear the loss occasioned by Heller's inability to pay the full amount of the purchase price.

As required by the Packers & Stockyards Act, IBP promptly paid Heller when it received delivery of the cattle. The Fifth Circuit improperly characterized this payment as an "advance" of funds and relied upon this circumstance for its conclusion that Heller was an agent of IBP (A9):

> The most persuasive evidence to us is the combination of advances by IBP and delayed payments by Heller (Heller often paid later than the period prescribed by the Packers & Stockyards Act), so that in effect cattle bought by Heller were being paid for by IBP's funds channeled through Heller's bank account.

But viewed under the system of cattle dealing mandated by the Packers & Stockyards Act, both these factors require the opposite result as a matter of law. IBP's partial payment to Heller upon receipt of the cattle enabled Heller to pay Valley View. The facts that Valley View extended credit to Heller, and that Heller went bankrupt before Valley View could collect, offer no justification for imposing liability upon IBP. The result can only be explained as a manifestation of exaggerated concern for cattle sellers, contrary to the express teaching of *Mahon* v. *Stowers* that under the Packers & Stockyards Act (i) the packer does not "hold cattle or carcasses in trust until the sellers actually convert into cash the checks given them as payment for each sale" (416 U. S. at 107), and (ii) the packer is not a trustee for proceeds of any sale derived from cattle delivered to it (416 U. S. at 110). Imposing upon IBP the penalty of paying twice

for the same cattle contravenes the Packers & Stockyards Act policy of prompt payment by packers and the policy expressed in *Mahon* v. *Stowers* that cattle sellers are not entitled to preferential treatment.*

The mischief of the improper result reached by the Fifth Circuit is compounded by the error of the trial court in permitting Valley View's "expert" witness to testify that IBP's prompt payments to Heller were illegal under the Packers & Stockyards Act regulations prohibiting packers from financing dealers. (Tr. 322-325.) IBP's payment of a portion of the purchase price upon delivery by Heller did not constitute financing within the meaning of the applicable regulations (9 C. F. R. § 201.68(a))—and the Packers & Stockyards Administration has so ruled in an informal opinion (Appendix C). The Fifth Circuit, though, cited this factor as the strongest indication of an agency relationship. In fact, drafting procedures even to advance operating funds to independent cattle buyers are not unusual in the cattle industry, and do not connote an agency relationship. *Hays Livestock Comm'n Co.* v. *Maly Livestock Comm'n Co.*, 498 F. 2d 925 (10th Cir. 1974). Thus, IBP was prejudiced in the trial court by being falsely accused of violating the law, and then the Fifth Circuit seized upon this erroneous and incompetent* testimony to override controlling Texas law with respect to agency principles.

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* The Tenth Circuit has also stressed the policy underlying *Mahon* v. *Stowers* that the Packers & Stockyards Act was not designed to provide a remedy for every worthless check or dishonored draft. *Hays Live Stock Comm'n Co.* v. *Maly Livestock Comm'n Co.*, 498 F. 2d 925 (10th Cir. 1974).

* The alleged expert testimony regarding "usage of trade" as to packer advances was absolutely prohibited under UCC § 1-205(6):

> Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

There was no such notice and finding in this case (Tr. 271-272), and IBP's counsel made timely objection to such testimony. (Tr. 269, 310-311, 359-360.)

B. The Decision Below Misapplies Texas Agency Law on a Significant Commercial Issue.

On the undisputed facts, IBP was entitled to judgment as a matter of Texas agency law. In a consistent line of decisions, the Texas courts have held that a dealer, like Heller, who acquires property in his own name at one price, to be resold to another at a different price, cannot be an agent. These cases involved factors much stronger than those cited in the Fifth Circuit's opinion as sufficient to permit the jury to speculate on the possible existence of an agency relationship:

In *St. Louis & S. F. R.* v. *Blocker*, 138 S. W. 156 (Tex. Civ. App. 1911), Bunn bought timber for Blocker under an arrangement identical to the Heller-IBP arrangement: Blocker furnished Bunn with a list of delivered prices he would pay for different classes of timber, and even *knowingly advanced funds* so Bunn could purchase "sufficient quantities" of timber "from whom he pleased," with checks of his own," and at "whatever price he saw fit." The court held that there was no issue to submit to the jury:

> The retention of title by one who acquires property at one price to be again sold to another at a different price is *wholly inconsistent* with the relation of principal and agent. (138 S. W. at 162; emphasis supplied.)

In *Kempner* v. *Huntsville State Bank*, 282 S. W. 325 (Tex. Civ. App. 926), Jordan bought cotton in the country to resell to Kempner on a grade and weight basis, delivered at Galveston. Jordan had to pay his own freight and expenses and got no commission; he "simply expected to make the difference between what he paid the farmers and what he got on his resale to Kempner * * *." 282 S. W. at 327. Despite the fact that Jordan drafted Kempner at the time of *shipment* for an "advance" sufficient to cover the checks he had issued to his suppliers and even testified that he "bought the cotton for Kempner's account," the court reversed and rendered a jury

verdict, holding that "no agency was mutually contemplated, or in fact existed." 382 S. W. at 327-328.

In *Tarver Steel & Co.* v. *Pendleton Gin Co.*, 25 S. W. 2d 156 (Tex. Civ. App. 1930), Tarver gave daily quotations of prices for different classes of cotton to Rhea ("offers to purchase") and Rhea accepted the offers by purchasing cotton on his own account and shipping it to Tarver, immediately drafting Tarver for the price he had paid his suppliers, subject to adjustment after the cotton had been graded and weighed. Citing *Blocker*, the court held that it was "absolutely determinative" of lack of agency that Rhea could have resold the cotton to anyone he chose. It was irrelevant, as a matter of law, that Tarver had always honored Rhea's drafts, that suppliers' invoices to Rhea were made out on blanks containing Tarver's name, and that the documents of title were made out directly to Tarver. 25 S. W. 2d at 159-160.

In *American Employers Ins. Co.* v. *Kilgore*, 412 S. W. 2d 67 (Tex. Civ. App. 1967), the court refused to hold Kilgore liable, as an undisclosed principal, for the default of McConnell, a merchant who both bought and sold cotton on his own account and operated on a commission basis. The court held that there can be no agency "unless one is acting for and in behalf of another and subject to the other's control" and found that these elements were lacking because Kilgore had no control over the price McConnell might pay for cotton and was liable only for the fixed resale price Kilgore had agreed to pay McConnell.

The Fifth Circuit recognized (A4) that the rights of the parties must be governed by the Restatement of Agency § 14K, as applied by the Texas courts, which provides:

> One who contracts to acquire property from a third person and convey it to another is the agent of the other only if it is agreed that he is to act primarily for the benefit of the other and not for himself.

It further cited the three factors that determine that the middleman is an independent contractor rather than an agent (A4):

> (1) That he is to receive a fixed price for the property, irrespective of the price paid by him. This is the most important. (2) That he acts in his own name and receives the title to the property which he thereafter is to transfer. (3) That he has an independent business in buying and selling similar property.

The undisputed evidence regarding these factors establish that Heller was not an agent as a matter of law, and the Fifth Circuit concedes as much:

First, Heller received a fixed price from IBP, regardless of the price he paid for the cattle. In fact, Heller *lost* money on the transaction in issue.

Second, Heller acted in his own name and took title to the cattle. Valley View invoiced the cattle to Heller, its books showed Heller as the buyer, the shipping documents named Heller as the owner, and "Valley View claimed against Heller's Packers & Stockyards Act surety bond, asserting that he was the purchaser of the cattle, and against Heller's bankrupt estate, and partially recovered from both." (A8.)

Third, the evidence was "not disputed that with respect to other packers Heller operated as an independent dealer engaged in buying cattle for his own account and selling to packers." (A8.)

Against these factors which compelled the finding, as a matter of law, that Heller was not an agent, the Fifth Circuit alluded to irrelevant trivia regarding Heller's general business practices and certain conversations having nothing to do with "the instant transaction" to support the inference of agency. (A7.) For instance, the facts that Heller bought large amounts of cattle, paid top dollar, wrangled credit for himself from Valley View, and leased railroad cars himself to deliver cattle to IBP have absolutely no legal bearing on the question of agency. Under Texas law, the relationship between Heller and IBP depends solely on the criteria set forth in the Restatement of

Agency and under the undisputed facts a finding of agency was legally impermissible.

C. There Is a Conflict Among the Circuits on the Question of Agency That Was Found Controlling by the Lower Courts.

The holding of the Fifth Circuit conflicts, on the controlling question of law, with the decision of the Eighth Circuit in *Farm Bureau Co-Operative Mill & Supply, Inc.* v. *Blue Star Foods, Inc.*, 238 F. 2d 326 (8th Cir. 1956). The plaintiff in *Farm Bureau Co-Op* sold chickens to Glover; and after payment of Glover's checks had been refused, the Co-Op claimed that Glover was acting as an agent for defendant Blue Star in buying the chickens. The operative facts in *Farm Bureau Co-Op* more strongly tended to support an inference of agency than the undisputed facts of this case. Blue Star had contracted to pay Glover a specified per-pound commission for chickens delivered to Blue Star at specified prices; and Glover was even authorized to draw drafts on Blue Star for chickens bought for its account. Consequently, Glover was guaranteed a profit if he could buy the chickens at the price fixed by Blue Star. However, Blue Star gave Glover no instructions as to where he should buy the chickens or how he should deliver them. The Eighth Circuit stressed:

> No right of control by defendant was reserved in the contract or exercised in the performance thereof over the manner, methods or means by which Glover would acquire and deliver chickens to defendant, nor did it require personal services by Glover, but he was free to perform personally or through his own agents and at his own pleasure as to time, and no definite hours of labor or service were required. It simply compensated Glover for the use of his trucks and services when he could buy chickens for defendant at the price fixed by defendant. (238 F. 2d at 334.)

In these circumstances, the Eighth Circuit held as a matter of law that Glover was an independent contractor, not an agent,

relying on the test set forth in the Restatement of Agency. (238 F. 2d at 334.)

Moreover, the Eighth Circuit held as a matter of law that Blue Star should not be forced to pay twice for the chickens because of Glover's fraud. The facts show that the Co-Op had made the fraud possible, and accordingly should bear the loss. This ruling directly conflicts with the result reached by the Fifth Circuit. By extending credit to Heller, Valley View was solely responsible for the non-payment resulting from Heller's subsequent bankruptcy. It was undisputed that IBP had no knowledge of the arrangements between Valley View and Heller. Indeed, by paying Heller promptly, as required by the Packers & Stockyards Administration's prompt payment regulation (9 C. F. R. § 201.43(b)), IBP had supplied Heller with sufficient funds to satisfy his obligation to Valley View. Under the rule set forth by the Eighth Circuit, IBP should not suffer by reason of the fact that Valley View extended credit to Heller that permitted Heller to use the money received from IBP for his own purposes. *Farm Bureau Co-Op*, 238 F. 2d at 326. *See also In the Matter of Samuels & Co., Inc.*, 526 F. 2d 1238, 1252 (5th Cir. 1976), *en banc, on remand from Mahon* v. *Stowers*, 416 U. S. 100 (1974). IBP paid Heller for the cattle when he delivered them and, as a matter of law, cannot be forced to pay again for the same cattle.

This conflict between the holdings of the Fifth and Eighth Circuits creates uncertainty in a wide range of commercial transactions, which should be resolved in a way that encourages, rather than penalizes, prompt payment by food processors to their suppliers.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Dated July 1, 1977.

APPENDIX A.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

No. 75-4245.

March 18, 1977.

VALLEY VIEW CATTLE COMPANY,
Plaintiff-Appellee,

vs.

IOWA BEEF PROCESSORS, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas, Sarah Tilghman Hughes, Senior District Judge.

Before BROWN, *Chief Judge,* GODBOLD, *Circuit Judge,* and MEHRTENS*, *District Judge.*

GODBOLD, *Circuit Judge:*

Valley View Cattle Company conducted negotiations in Hereford, Texas, with Louie Heller for the sale of 259 head of cattle. Heller took possession of the cattle on January 29 and immediately made arrangements to have them shipped to the Iowa Beef Processors' plant in Emporia, Kansas, where they arrived the next day. On January 30, after receiving the cattle, IBP advanced approximately 90% of the estimated dressed

* Senior District Judge for the Southern District of Florida, sitting by designation.

price to Heller.[1] On January 31, after the cattle had been slaughtered, IBP sent Heller a check for the balance due him. Valley View billed Heller for the purchase price but his checks were not honored. On February 12 some of Heller's creditors filed an involuntary bankruptcy petition against him, and later he was adjudicated bankrupt.

[1] Valley View filed this diversity suit against IBP in the Northern District of Texas seeking to recover the value of the 259 head of cattle. Valley View advanced three theories of recovery which were submitted to the jury on special interrogatories: (1) Heller was acting as the agent of IBP in the purchase of the cattle; (2) Heller was vested with apparent authority; and (3) IBP was guilty of conversion because it purchased the cattle from Heller in bad faith and therefore could not receive good title. All issues were resolved in favor of Valley View, and the trial court entered a $113,649.41 judgment for Valley View. IBP moved for a judgment n. o. v. on the ground that there was insufficient evidence to support any theory of recovery advanced by Valley View and in the alternative for a new trial. The motions were denied and IBP appeals. We affirm on the grounds that the trial court did not abuse its discretion in denying IBP's motion for new trial[2] and that there was sufficient evidence in

1. Dressed price is based upon the carcass weight of the cattle after slaughter.

2. In this circuit, the grant or denial of a motion for a new trial is within the sound discretion of the trial court and will not be disturbed absent a clear showing of abuse of discretion. *E.g., Harris* v. *Chanclor*, 537 F. 2d 203, 207 (CA 5, 1976); *Sulmeyer* v. *Coca Cola Co.*, 515 F. 2d 835, 851-52 (CA 5, 1975); *Dreiling* v. *General Elec. Co.*, 511 F. 2d 768, 776 (CA 5, 1975); *Woods Expl. & Prod. Co., Inc.* v. *Aluminum Co. of Am.*, 509 F. 2d 784, 792 n. 3 (CA 5, 1975); *Massey* v. *Gulf Oil Corp.*, 508 F. 2d 92, 94-95 (CA 5, 1975); *see also, Urti* v. *Transport Commercial Corp.*, 479 F. 2d 766, 769 (CA 5, 1973).

In *Massey* we stated:

> "[T]he operative factors underlying review of a ruling on a new trial motion are deference to the trial judge, who has had the opportunity to observe the witnesses and to consider the evi-

(Footnote continued on next page.)

support of the jury's finding that Heller purchased the cattle in question as the agent of IBP.[3]

Agency, Actual and Implied.

[2-4] Under Texas law,[4] "[t]he relation of agency is a consensual relation existing between two persons, by virtue of which one of them is to act for and in behalf of the other and subject

(Footnote continued from preceding page.)

> dence in the context of a living trial rather than upon a cold record, deference to the jury's determination of weight of the evidence and quantum of damages, and the constitutional allocation to juries of questions of fact. . . . [W]here the judge denies the motion and leaves undisturbed the jury's determination, all factors press in the direction of leaving the trial judge's ruling undisturbed. . . ."

508 F. 2d at 94-95.

3. The standard of review for the grant or denial of a motion for judgment n. o. v. was set out in *Boeing Co.* v. *Shipman*, 411 F. 2d 365 (CA 5, 1969) (*en banc*):

> "On motion for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n. o. v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses."

Id. at 374-75.

4. The parties agree that Texas law controls.

to his control." *Sorenson* v. *Shupe Bros. Co.*, 517 S. W. 2d 861, 864 (Tex. Civ. App., 1974), *quoting*, *Roper* v. *Compania De Perforaciones Y Servicio, S. A.*, 315 S. W. 2d 30, 33 (Tex. Civ. App., 1958) *and Bertrand* v. *Mutual Motor Co.*, 38 S. W. 2d 417, 418 (Tex. Civ. App., 1931). The relationship of agent and principal is created either by express or implied contract or by operation of law. *Green* v. *Hannon*, 369 S. W. 2d 853, 856 (Tex. Civ. App., 1963). Thus, the existence of an agency relationship may be implied from the conduct of the parties. *Panhandle Steel Erectors, Inc.* v. *Whitlow*, 359 S. W. 2d 146, 149 (Tex. Civ. App., 1962).

The Texas courts have adopted Restatement (Second) of Agency § 14K (1957):

> Agent or Supplier
>
> One who contracts to acquire property from a third person and convey it to another is the agent of the other *only if it is agreed that he is to act primarily for the benefit of the other and not for himself.* (Emphasis added.)

See, *American Employers Insurance Co.* v. *Kilgore*, 412 S. W. 2d 67, 69 (Tex. Civ. App., 1967). More particularly, the court in *Kilgore* quoted from and applied the factors for determining the existence of agency set out in the comments to § 14K, as follows:

> Factors indicating that the one who is to acquire the property and transfer it to the other is selling to, and not acting as agent for, the other are: (1) That he is to receive a fixed price for the property, irrespective of the price paid by him. This is the most important. (2) That he acts in his own name and receives the title to the property which he thereafter is to transfer. (3) That he has an independent business in buying and selling similar property.

Restatement (Second) of Agency § 14K, Comment, at 75-76 (1957); *Kilgore*, 412 S. W. 2d at 69.

[5] Heller's dealings with IBP commenced in either 1966 or 1967, at which time Heller contacted IBP's head cattle buyer, Russell Walker, offering to sell IBP two loads of cattle. IBP

accepted Heller's offer, and shortly thereafter they entered into a business arrangement or fixed course of dealings which continued for about eight years until the events from which this case arose. Heller would call Walker almost every day and receive the price IBP would pay for dressed cattle, how many head IBP was interested in, when IBP wanted them delivered and how long the offer was open. Heller knew the maximum weight per head that IBP desired. Heller would generally accept all or a portion of the offer either at that time or at a later time before the offer lapsed. Next, Heller would ship the agreed head of cattle to IBP where they would be slaughtered. Once their dressed weight was determined, payment was made to Heller by check. If requested, IBP would advance Heller a substantial portion of the estimated dressed weight of the cattle after they were in IBP's possession. This arrangement was in effect on January 29, 1974, and continued in effect until Heller's bankruptcy.

The parties agree that in the industry there are basically three types of cattle buyers who act as intermediaries between the feed lots and the beef packers:

"Packer buyer": a salaried employee of the packer.

"Order buyer": a person who buys for various packing firms and is compensated on a commission basis. He may buy in his own name, the name of the packer or both.

"Dealer": an independent buyer, who buys for his own account in the hope that he can later resell for a profit. A cattle buyer can function in different capacities in different transactions.

On this appeal IBP argues that there was insufficient evidence from which a consensual agency arrangement between it and Heller can be inferred and that, to the contrary, the evidence demonstrates conclusively that Heller was an independent dealer buying for his own account and dealt with Valley View in that capacity. Valley View points to evidence which circumstantially tends to show that Heller was not an independent dealer but was an order buyer acting as the agent of IBP and vested with actual or implied authority.[5] Therefore, we review the evidence

tending to show the existence of agency, express or implied, bearing in mind the "primarily for the benefit" test of § 14K, the indicia of the comment to that section that were followed and applied in *Kilgore*, the dichotomy in the industry between order buyers and independent dealers, and the details of the arrangements and dealings between IBP and Heller.

(1) Heller was IBP's only regular buyer in the South Plains area of west Texas. IBP had at least some control over the choice of area in which Heller could buy cattle to be shipped to IBP.

(2) It was understood between Heller and IBP what kind of cattle IBP was interested in. Heller called IBP almost every day to find what IBP would pay for dressed cattle and how many head IBP wanted. Thus, IBP controlled size, quality and quantity purchased by Heller to be shipped to it.

(3) Although no evidence of the exact volume of Heller's dealings with IBP was introduced at the trial of the case, it is apparent that these dealings constituted a large percentage of Heller's total business. Robert Wagoner, a truck driver who hauled approximately 100,000 head of cattle per year for Heller, testified that 98% of the cattle he handled were delivered to rail cars bound for IBP's plant in Emporia, Kansas. A feed lot manager stated that 85 to 90% of the cattle Heller bought at his feed lot were shipped to IBP. Heller testified that IBP would generally take whatever he could get. According to the testimony of Eugene Redd, a livestock order buyer and independent dealer, Heller was the only purported dealer Redd had ever encountered doing such a large volume of business with one packer.

(4) IBP regularly advanced to Heller, at his request, a large portion of the estimated dressed price of the cattle, and in the instant transaction advanced 90%. In the early stages of their dealings Heller did not ask for advances, but as time passed his requests became more and more frequent. Heller could not recall a request for an advance being denied or altered in any way. Redd testified that advancing in this manner was an uncommon

5. Heller was not a salaried employee of IBP and, therefore, was not a packer buyer.

practice, not generally available to a dealer. Another witness testified that risk of loss was a distinguishing feature between dealers and order buyers. Inferentially, Heller's regular receipt of advance notice from IBP of the price he would be paid limited his risk of loss and was inconsistent with the status of an independent dealer.

(5) Dealers normally pay cattle sellers within 48 hours after the cattle are weighed. Heller customarily paid his sellers by check written on the weekend for purchases made during the week.

(6) Heller consistently paid "top dollar" among cattle buyers in the South Plains and helped to hold the market price up. Inferentially, an independent dealer buying for his own account could not regularly do this and survive.

(7) Heller leased railroad cars for the sole purpose of shipping cattle to IBP's Emporia, Kansas, plant. Plaintiff's expert witness, Holly Toler, stated this practice was consistent with his conception of an order buyer.

(8) IBP's daily conversations with its packer buyers were similar to its instructions to Heller.

(9) Heller billed IBP with invoices on which, below his name, was printed "LIVESTOCK DEALER" and "ORDER BUYER."

(10) During a price freeze in 1973, IBP was unable to sell to its customers and make a suitable margin. At IBP's instruction or request Heller made an unusually large purchase of cattle and shipped them directly to IBP customers in his name.

(11) Though not in connection with the instant transaction, Heller had told Cox (owner of Valley View) and Moss (operator of the feed lot where the cattle were picked up and invoiced out) that he bought cattle for IBP.

There is, on the other hand, considerable evidence which tends to prove that Heller dealt with Valley View as an independent dealer.

(a) The cattle bought by Heller from Valley View on this and prior occasions were invoiced to him, the feed lot's scale tickets showing weight of the animals named him as buyer, and he paid with his own checks.

(b) At times Valley View had sold cattle to IBP's salaried packer-buyers, and these had been paid for by IBP checks.

(c) On Valley View's books the transaction was shown in Heller's name.

(d) The cattle were shipped by rail, and the bill of lading showed Heller as shipper. No documents sent with the cattle showed IBP where they had been bought.

(e) On February 20, Valley View made a book entry charging off Heller's bad checks as "Bad debt—James Heller."

(f) Valley View claimed against Heller's Packers & Stockyards Act surety bond, asserting that he was the purchaser of the cattle, and against Heller's bankrupt estate, and partially recovered from both.

IBP asserts that ample evidence was introduced tending to satisfy the agency-negating indicia of the Restatement and *Kilgore*. Heller always received a fixed price from IBP. This, according to the Restatement, is the most important factor. No factor, however, is conclusive. For example, the Comment to § 14K states that if there is agency the difference between what the agent paid for goods and what he is to receive for the goods must "normally . . . be accounted for," but that a "principal may agree that his buying agent is to retain the amount."

Heller received title to the cattle in his own name, but he told Moss and Cox that he bought cattle for IBP on the South Plains.

As to the third indicium under § 14K, it is not disputed that with respect to other packers Heller operated as an independent dealer engaged in buying cattle for his own account and selling to packers. But the volume was relatively small in comparison to the large volume done with IBP, and there is no contention that these purchases and sales were done in the same or similar manner to an arrangement carried on with IBP and described above.

The body of evidence gravitates in two different directions. It tends to establish that, with respect to his purchases of cattle destined for IBP, Heller gave the appearance of an independent dealer and Valley View dealt with him as though he were an independent dealer. But this evidence does not obviate the possibility that, by arrangement express or implied between IBP and Heller, Heller was actually authorized to serve as IBP's agent in buying cattle. The special arrangements between them, and the other evidence, some of which we have outlined, permitted a jury to draw that inference.

Much of the evidence relied upon by IBP tends to negate that Heller was clothed with apparent authority and to establish that Valley View dealt with Heller as an independent dealer (and therefore did not rely upon apparent authority). Most of it does not reach the question of whether Heller was acting with actual or implied authority, that is, was actual agent for IBP. The most persuasive evidence to us is the combination of advances by IBP and delayed payments by Heller (Heller often paid later than the period prescribed by the Packers & Stockyards Act), so that in effect cattle bought by Heller were being paid for by IBP's funds channeled through Heller's bank account. The arrangement permitted Heller to buy in greater quantities than a dealer operating in the usual manner would have been able to buy. Advances to Heller averaged around $7,000,000 for a month or slightly more than a month. There was evidence that the packing industry as a whole does not engage in the practice of making advances. Also the arrangement between IBP and Heller gave IBP considerable actual control over Heller's activities and even broader power of control.

As jurors we might have reached a different verdict. But we do not sit as thirteenth jurors. The evidence was sufficient to take the case to the jury on actual and implied authority, the jury has decided that, and there it must end. We need not discuss the other issues.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 75-4245

D. C. Docket No. CA 3-74-578 B

VALLEY VIEW CATTLE COMPANY,
Plaintiff-Appellee,

vs.

IOWA BEEF PROCESSORS, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

Before BROWN, *Chief Judge,* GODBOLD, *Circuit Judge,* and MEHRTENS,* *District Judge.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

March 18, 1977

Issued as Mandate:

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*Senior District Judge for the Southern District of Florida, sitting by designation.

APPENDIX B.

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

April 15, 1977

To All Parties Listed Below:

No. 75-4245—Valley View Cattle Co. v. Iowa Beef Processors, Inc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH, *Clerk,*

/smg

cc: Mr. Edward W. Rothe,
Mr. Charles Meadows,
Mr. Mike McKool, Jr.

APPENDIX C.

DEPARTMENT OF AGRICULTURE
Packers and Stockyards Administration
Washington, D. C. 20250

Office of the Administrator

June 4, 1976

Mr. Edwin H. Pewett
Glassie, Pewett, Beebe & Shanks
Federal Bar Building West
1819 H Street, N. W.
Washington, D. C. 20006

Dear Mr. Pewett:

This is in reply to your letter of June 3 requesting clarification of the agency's position concerning a packer advancing funds on livestock purchased on a grade and weight basis prior to slaughter and final price determination.

If a packer buying livestock on a grade and weight basis has the livestock in his possession, it would not be considered financing or a violation of Regulation 201.68(a) for a packer to advance the estimated purchase price of the livestock or a substantial portion thereof prior to slaughter. It is possible, however, that if a packer consistently made estimated payments on grade and weight purchases greater than the actual value, such advances could be considered to be in violation of Regulation 201.68(a). This would be a determination made on a case-by-case basis.

We trust this answers your questions satisfactorily, but if you have additional questions, feel free to contact me.

Sincerely,

MARVIN L. MCLAIN
Marvin L. McLain
Administrator